

**SHORT FORM ORDER**

SCAU

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

HON. BERNARD F. McCAFFREY

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

BRIDGETTE WARTELL,

INDEX NO. 14256/00

Plaintiff,

-against-

MOTION SUBMISSION  
DATE: 3/26/02

MOTION NOS. 2 & 3

JOHN GUZZO and JOHN MASSUCCI,

Defendants.

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Defendants' applications, pursuant to CPLR 3212, for awards of summary judgment dismissing plaintiff's complaint against them are determined as hereinafter provided.

This personal injury action emanates out of a 7/23/98 motor vehicle accident which occurred at approximately 12:30 a.m. on the westbound portion of Hempstead Turnpike at or near its intersection with Park Boulevard in East Meadow, New York.

Plaintiff filed a 9/7/00 complaint which was subsequently amended on or about 10/25/00. A single cause of action sounding in negligence was pleaded. Upon the completion of disclosure, the case was certified for trial on 1/3/02 and on or about 3/25/02 a note of issue was filed. Defendants applications are therefore timely (CPLR 3212[a]).

During a 7/17/01 deposition plaintiff testified, inter alia, that she was operating a green 1994 Toyota Corolla (p. 25, l. 9) with four (4) friends as passengers (p. 9, ls. 17-21) and was headed for the Colony Diner (p. 16, l. 14). They had reportedly been traveling on Hempstead Turnpike for approximately 15-20 minutes (p. 28, l. 21; p. 29, l. 23) at a maximum speed of 40 miles per hour (p. 34, l. 6) in the middle lane (p. 39, l. 25).

Near a traffic light adjacent to an OTB in Levittown (p. 41, l. 12; p. 47, l. 15), she initially observed a black Cougar (owned by defendant John Guzzo and permissively operated by defendant John Guzzo, Jr.) with “two boys” (p. 40, l. 22). She also observed a red Camaro (operated by defendant John Massucci) (p. 43, l. 25) “[a]head on the side” (p. 44, l. 21). The occupants of the Cougar allegedly pointed at plaintiff’s vehicle (p. 43, l. 13) but from then until the time of the accident, she observed no further gestures (p. 43, l. 20). The occupants of defendants’ vehicles also reportedly spoke to each other (p. 49, l. 9). Plaintiff’s vehicle was purportedly behind defendant Guzzo’s Cougar in the middle lane (p. 50, l. 7). The accident occurred approximately two to three minutes later (p. 46, l. 7).

At some point after they proceeded through the intersection, the boys were allegedly looking at plaintiff’s vehicle as if “[t]hey wanted to talk to us” (p. 53, ls. 13-21). The Cougar purportedly began “[s]witching lanes, flashing hazards, stepping on brakes and signaling” (p. 55, l. 17) while plaintiff’s vehicle remained behind it (p. 57, l. 6). Mr. Massucci’s Camaro remained ahead in the left lane (p. 59, ls. 15-19) although within thirty (30) feet of the accident it reportedly “slowed down” (p. 62, l. 6), “switched lanes” (p. 61, l. 18) and he talked to the occupants of the of the Cougar (p. 70, l. 14). At that time the Cougar allegedly began “[h]onking, stepping on his brakes, switching in and out of lanes [and using his] hazards” (p. 62, l. 20) and ultimately “switched into [plaintiff’s] lane” (p. 65, l. 3) cutting her off (p. 64, l. 23). She tried to move into the right lane (p. 64, l. 5) when the Cougar (Mr. Guzzo) purportedly switched from the left lane into the middle one (p. 65, ls. 4-10) a “car length or less” (p. 67, l. 8) or approximately five (5) feet (p. 85, l. 18) in front of her. She looked to her right and “cut the wheel” (p. 68, l. 13) and the car “fishtailed” (p. 69, l. 8) and began skidding (p. 78, l. 23) at approximately 40 miles per hour (p. 69, l. 18). The Cougar was in front of her in the middle lane while the Camaro stayed in the left lane (p. 71, ls. 6-11). The vehicle skidded about 30 feet (p. 71, l. 16) and struck the sidewalk, the fence and a tree (p. 39, l. 12). Her 2/20/02 affidavit in opposition is consistent and states, in pertinent part, “The black Cougar suddenly cut in front of me, causing me to lose control of my car. My car then went off the side of the road, and then hit a fence and a tree” (para. 2).

Mr. Guzzo was deposed on 8/10/01. On 7/23/98 he was permissively operating his father, defendant John Guzzo's, black Cougar (p. 42, l. 10) with two (2) passengers, Marco Vargas and Tom Frascella (p. 44, l. 24). He recalled that at some point prior to the accident, the occupants of plaintiff's vehicle were "waving, smiling" and "verbalizing" (p. 67, l. 2; p. 70, l. 9). His friend, Mr. Massucci, was operating the Camaro in the left lane (p. 71, l. 15). While at the traffic light he said hello to the girls and they responded (p. 73, ls. 18-24).

After the light, he reportedly remained in the middle lane (p. 76, l. 15) and the accident occurred approximately 5-10 minutes later (p. 76, l. 10). Plaintiff's vehicle was allegedly in the middle lane behind him and moved into the right lane at about 40-45 miles per hour (p. 79, l. 25). After moving into the right lane, she purportedly accelerated to approximately 65-70 miles per hour (p. 80, l. 12) and cut the wheel to pass the Cougar on the right and move back into the middle lane (p. 81, ls. 13-18; p. 61, ls. 21-25). She allegedly got the front half of her vehicle into the middle lane and lost control after it began fishtailing (p. 82, ls. 6-13). She reportedly did not use a directional signal (p. 83, l. 6). His vehicle remained in the middle lane (p. 85, l. 17) and Mr. Massucci's was in the left lane (p. 89, l. 20) "a little bit ahead of me" (p. 112, l. 4). When plaintiff lost control of her vehicle, he hit the brakes (p. 86, l. 24), moved into the left lane and made a u-turn so he could see what happened (p. 87, ls. 2-9). He then stopped his car and ran across the street (p. 88, l. 25 - p. 89, l. 2).

During Mr. Massucci's 7/17/01 deposition, he testified, inter alia, that he was "just driving around" (p. 11, l. 2) with Mr. Guzzo and that there were no passengers in his vehicle (p. 111, l. 5). They were together for about 15-20 minutes before the accident (p. 15, l. 23; p. 13, l. 13) cruising at approximately forty (40) miles per hour to meet women (p. 16, l. 20; p. 18, l. 22). About ten (10) minutes before the accident (p. 23, l. 3) he observed or pulled along side of plaintiff's car (p. 19, ls. 9-21). Mr. Guzzo's vehicle was "in the vicinity" (p. 23, l. 16).

When he initially observed plaintiff's vehicle, the girls were reportedly "[j]umping around" and waving back as he and Mr. Guzzo waved and honked their horns (p. 23, l. 21). The accident took place about ten (10) minutes later (p. 28, l. 12). His vehicle was in the left lane (p. 29, l. 8) "a little ahead of [Mr. Guzzo]" (p. 31, l. 18). Immediately before the accident, plaintiff's vehicle was allegedly in the right lane (p. 30, l. 7) right next to Mr. Guzzo who was in the middle lane (p. 31, l. 7; p. 35, l. 17). The parties reportedly continued to smile and wave throughout (p. 38, l. 15). Plaintiff purportedly tried to pass Mr. Guzzo's vehicle and lost control (p. 40, l. 19) at which time he was allegedly in the left lane (p. 42, ls. 12-16). Afterwards, he slowed down, saw Mr. Guzzo pull over and went home (p. 44, l. 15).

Mr. Guzzo's passengers, Mr. Vargas and Mr. Frascella, were also deposed. Mr. Vargas' recollection was that after the traffic light their vehicle was in the center lane (p. 20, l. 23). He reportedly "looked behind us and saw [plaintiff's] ...bright lights speeding behind us" (p. 20, l. 25 - p. 21, l. 2). "[T]hey were in the center lane, and their lights were coming real fast" (p. 21, ls. 4-6). "As they got real close to us, they moved real quick to the right lane" (p. 21, ls. 17-18). Plaintiff then "made a quick left to cut us off" (p. 21, l. 24) at approximately "55 and 70 miles per hour" (p. 22, l. 6). Her car was reportedly "one to two car lengths" in front of the Cougar (p. 22, l. 15). Plaintiff allegedly cut the wheel too sharply and "went up on two wheels slightly" (p. 22, l. 21) before she overcompensated and lost control (p. 23, ls. 14-24).

Mr. Frascella likewise testified, inter alia, they "were in the center lane, and [plaintiff] came up on the right lane, cut into the center lane and totally lost control" (p. 13, ls 19-21; p. 15, ls. 7-14). Mr. Massucci's vehicle was to their left (p. 21, l. 14; p. 46, l. 15; p. 56, l. 15; p. 65, l. 19). All the gestures from Mr. Guzzo's Cougar reportedly ceased "awhile back" (p. 44, l. 5) whereas the occupants of plaintiff's vehicle were "waving or jumping around" (p. 45, ls. 4-10). The last gesture or interaction between vehicles allegedly terminated "[f]ive minutes. A couple of minutes" prior to the accident (p. 68, l. 13).

Finally, one of the occupants of plaintiff's vehicle, Rachel Rhode, was deposed. She was a passenger in the front seat of plaintiff's Toyota (p. 5, l. 24). She stated, "there were two cars of the guys in front [of] us and I just - I don't remember what they were doing. I remember they put their hazards on and talking - each car was talking. And they were slamming on the brakes" (p. 16, ls. 16-21). "And out of frustration or I don't know, Bridgette, went to go around them. And that's when she lost control of the car" (p. 16, l. 24 - p. 17, l. 3).. Alternatively, she said "we were on Hempstead Turnpike, and [plaintiff] lost control of the car. So, we were fishtailing and then she got nervous I guess and slammed on the brake and we spun around" (p. 14, ls. 13-17). She didn't recall any gesturing or interaction between plaintiff's vehicle and either or both of the other two vehicles immediately prior to the accident (p. 30, l. 12).

In addition, two other non-party witnesses, Charles McNulty and Robert Koegler, provided statements to the police (exhibit 1 to plaintiff's affirmation in opposition). They were leaving an adjacent Friendly's Restaurant and Mr. McNulty observed "two cars... racing on Hempstead Turnpike ....I saw a car move in front of the (Gr.) car and that's when the (Gr.) went out of control...." I saw that it was a blk. car that cut off the (Gr.) car, that made them go out of control...." Mr. Koegler similarly stated "I observed the dark car swerve in front of the green car which lost control and skid[ed] into the fence and collide[d] with a tree in Eisenhower Park." Mr. Koegler's unsworn statement further provides "I heard a bunch of [unspecified] males stating that the[y] were fooling around swerving at each other."

Even a cursory review of the aforementioned depositions and affidavits reveals that a genuine issue of fact exists as to whether defendant John Guzzo, Jr. or plaintiff was speeding (Vehicle and Traffic Law §1180[a]) and negligently "cut off" or attempted to pass the other (Vehicle and Traffic Law §1128[a]). Indeed, the deposition testimony of Mr. Guzzo, his passengers (Mr. Vargas and Mr. Frascella) and plaintiff's passenger, Ms. Rhode, directly contradict plaintiff's testimony and the non-party statements of Mr. McNulty and Mr. Koegler. A party's negligence may proximately cause an accident even in the absence of physical contact between the vehicles (see. gen. Darmento vs. Pacific Molasses Company, 81 NY2d 985, 599 NYS2d 528, 530, 615 NE2d 1012 [1993]; Williams vs. City of New York, 240 AD2d 734, 659 NYS2d 302, 304 [2d Dept., 1997]); Sohet, et al. vs. Sheehan, 238 AD2d 573, 656 NYS2d 377; Dorazio vs. New York Telephone Company 266 AD 798; 42 NYS2d).

Plaintiff's EBT testimony summarizes Mr. Massucci's purported negligence in having switched lanes, slowed down and spoken to occupants of Mr. Guzzo's vehicle. However, she specifically states it was Mr. Guzzo's Cougar that cut her off, causing her to lose control of the car. According to plaintiff's version of the facts, she was proceeding driving in the middle lane, while defendant Massucci's vehicle was ahead of her in the left lane, followed by Mr. Guzzo's vehicle. She claims the accident occurred when Mr. Guzzo cut into the middle lane directly in front of her car and that she reacted by cutting her wheel towards the right lane as she braked. Mr. Guzzo's actions caused her to lose control of the car as her vehicle fishtailed and skidded off the road through a fence and into a tree. Two non-party witnesses also testified that the black car (Cougar owned by Mr. Guzzo) suddenly cut off the plaintiff, causing her to lose control of her car. Though Mr. Massucci may have operated his vehicle in an inappropriate manner that evening, said actions, if any, were not a substantial cause of the events which produced plaintiff's injuries. The location of his vehicle well ahead of plaintiff's car in the left lane and alleged actions during the time preceding said accident, were too remote to have constituted a proximate cause of the accident. Plaintiff's affidavit and EBT testimony, supported by the testimony of two independent non-party eyewitnesses, all support Mr. Guzzo's action in cutting her off as the sole proximate cause of plaintiff's loss of control of her car.

Accordingly, the applications of defendants John Guzzo and John Guzzo, Jr., pursuant to CPLR 3212, to summarily dismiss plaintiff's complaint against them is denied, while Mr. Massucci's application for an award of summary judgment dismissing plaintiff's action against him along with the Guzzos' cross claim for common law contribution or indemnification is granted.

**ENTERED**

Dated: JUL 05 2002

JUL 19 2002

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

J.S.C.